



OFFICE OF THE POLICE COMMISSIONER

ONE POLICE PLAZA • ROOM 1400

January 7, 2013

CHIEF

Memorandum for: Deputy Commissioner, Trials

Re: **Police Officer Keith McGurk**  
Tax Registry No. 942165  
73 Precinct  
Disciplinary Case No. 2010 2495

The above named member of the service appeared before Assistant Deputy Commissioner Robert W. Vinal on March 30, 2012 and was charged with the following:

**DISCIPLINARY CASE NO. 2010-2495**

1. Said Police Officer Keith McGurk, assigned to the 73<sup>rd</sup> Precinct, while on-duty, at or about 0130 hours, on October 8, 2009, [REDACTED], abused his authority as a member of the New York City Police Department in that he stopped Ernesto Matthews without sufficient legal authority.

**P.G. 212-11, Page 1, Paragraph 1 STOP AND FRISK**

2. Said Police Officer Keith McGurk, assigned to the 73<sup>rd</sup> Precinct, while on duty, at or about 0130 hours, on October 8, 2009, [REDACTED], abused his authority as a member of the New York City Police Department in that he frisked Ernesto Matthews without sufficient legal authority.

**P.G. 212-11, Page 1, Paragraph 2 STOP AND FRISK**

3. Said Police Officer Keith McGurk, assigned to the 73<sup>rd</sup> Precinct, while on duty, at or about 0130 hours, on or about October 8, 2009, [REDACTED] did wrongfully use force against Ernesto Matthews in that Police Officer McGurk struck Ernesto Matthews with a baton without proper police necessity.

**P.G. 212-11, Page 1, Paragraph 2 FORCE**

**DISCIPLINARY CASE NO. 2010-2495 POLICE OFFICER KEITH McGURK**

4. Said Police Officer Keith McGurk, assigned to the 73<sup>rd</sup> Precinct, while on-duty, at or about 0130 hours, on or about October 8, 2009 [REDACTED], abused his authority as a member of the New York City Police Department in that he arrested Ernesto Matthews without sufficient legal authority.

**P.G. 203-10, Page 1, Paragraph 5**

**ABUSE OF AUTHORITY**


5. Said Police Officer Keith McGurk, assigned to the 73<sup>rd</sup> Precinct, while on-duty, on or about October 8, 2009 [REDACTED], after having a street encounter with Ernesto Matthews, did fail to prepare a Stop, Question and Frisk Report Worksheet as required.

**P.G. 212-11, Page 1, Paragraph 6**

**STOP AND FRISK**

In a Memorandum dated July 31, 2012, Assistant Deputy Commissioner Robert W. Vinal found Respondent Guilty of Specification Nos. 2, 3, 4 and 5, and Not Guilty of Specification No. 1 in Disciplinary Case No. 2010-2495. Having read the Memorandum and analyzed the facts of this matter, I approve the findings, but disapprove the penalty.

Police Officer McGurk's misconduct in this instant matter, coupled with his prior discipline history, warrants the forfeiture of thirty (30) vacation days, as a disciplinary penalty.

A handwritten signature in black ink, appearing to read "Raymond W. Kelly". The signature is stylized with a large, loopy initial "R" and a long, sweeping underline.

Raymond W. Kelly  
Police Commissioner





POLICE DEPARTMENT

July 31, 2012

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Keith McGurk  
Tax Registry No. 942165  
73 Precinct  
Disciplinary Case No. 2010-2495

The above-named member of the Department appeared before me on March 30, 2012, charged with the following:

1. Said Police Officer Keith McGurk, assigned to the 73rd Precinct, while on-duty, at or about 0130 hours, on October 8, 2009, [REDACTED], abused his authority as a member of the New York City Police Department in that he stopped Ernesto Matthews without sufficient legal authority.

P.G. 212-11, Page 1, Paragraph 1 – STOP AND FRISK

2. Said Police Officer Keith McGurk, assigned to the 73rd Precinct, while on-duty, at or about 0130 hours, on October 8, 2009, [REDACTED], abused his authority as a member of the New York City Police Department in that he frisked Ernesto Matthews, without sufficient legal authority.

P.G. 212-11, Page 1, Paragraph 2 – STOP AND FRISK

3. Said Police Officer Keith McGurk, assigned to the 73rd Precinct, while on-duty, at or about 0130 hours, on or about October 8, 2009, [REDACTED], did wrongfully use force against Ernesto Matthews in that Police Officer McGurk struck Ernesto Matthews with a baton without proper police necessity.

P.G. 201-11, Page 1, Paragraph 2 FORCE

4. Said Police Officer Keith McGurk, assigned to the 73rd Precinct, while on-duty, at or about 0130 hours, on or about October 8, 2009, [REDACTED], abused his authority as a member of the New York City Police Department in that he arrested Ernesto Matthews, without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 -- ABUSE OF AUTHORITY

5. Said Police Officer Keith McGurk, assigned to the 73rd Precinct, while on-duty, on or about October 8, 2009, [REDACTED] after having a street encounter with Ernesto Matthews, did fail to prepare a Stop, Question and Frisk Report Worksheet as required.

P.G. 212-11, Page 1, Paragraph 6 -- STOP AND FRISK

The Department was represented by Mary Lynne Frey, Esq., Department Advocate's Office, and Respondent was represented by Michael Martinez, Esq.

Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondent is found Not Guilty of Specification No. 1. Respondent is found Guilty of Specification Nos. 2 through 5.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Ernesto Matthews and Police Officer April Andresen to testify on their behalf.

Ernesto Matthews

Matthews, a 24-year-old male who works fulltime as a cook at an IHOP Restaurant, recalled that in October, 2009, he was working with a catering agency.



Matthews resided at his mother's apartment [REDACTED], along with his sister, his two nieces and his sister's toy Yorkshire Terrier.

On October 8, 2009, Matthews was walking his sister's dog near the apartment complex at about 1:30 a.m. He testified that his next door neighbor, Hakim Morris, was walking with him both to keep him company and for his safety since [REDACTED] can be a dangerous area at night. Matthews estimated that he and Morris would normally take 15 minutes to walk the dog around the neighborhood before returning home. Matthews was wearing loose gray sweats and a fitted red "hoodie."

As Matthews and Morris turned the corner [REDACTED] [REDACTED], a police van containing four officers pulled up. One of the officers, who Matthews identified in the Trial Room as Respondent, instructed the men to "stop right there." Matthews recalled that Respondent told him that it looked like he "was up to no good." Matthews responded to this statement by asking, "How come I don't look like I'm up to no good?" Respondent then said, "You're walking a small Yorkie [REDACTED] [REDACTED]" and that "it looks like you're trying to smuggle something." Respondent said this as he was exiting the van. Matthews responded, "What type of racist joke is that?" Respondent approached Matthews and immediately began searching him. Respondent went into the pockets of Matthews' hoodie and the cargo pockets of his sweat pants and patted him down but Respondent "didn't find nothing."

The three other officers also exited the van. Morris was searched by the other officers but since they did not find anything on him and he did not say anything to them, they left him alone.

Matthews warned Respondent that he intended to "report him for harassment." Respondent and the other officers laughed at him "like it was a joke." Respondent then asked him, "You want to keep talking junk?" Respondent then turned him around and handcuffed him. Matthews asked him, "Why are you locking me up?" Respondent replied, "You want to keep talking trash? I'm a send you through the system." Matthews asked him, "What are you doing? This is wrong." Respondent then pushed Matthews against the van, took out his baton and, while standing behind Matthews, struck him with the baton three to four times on his back and two to three times on his right leg. The dog was still attached to the leash which Matthews was holding in his handcuffed hands. Matthews testified that Respondent's baton blows struck him somewhere between his right shoulder and his lower back and on his right leg from his knee to his thigh area while he was in handcuffs. None of the other officers assisted Respondent in striking Matthews. Respondent snatched the dog leash out of Matthews' hand which caused the dog to swing in the air. Respondent also snatched Matthews' keys out of his hand while he was still handcuffed and threw them on the street.

Matthews was placed into the van and transported to the 73 Precinct where he was held for approximately six hours. When he was escorted into the 73 Precinct, Matthews asked to go to the hospital and to speak to a captain. After he was transported to Central Booking, Matthews asked again to be taken to a hospital but he was told by an officer there that if he was taken to a hospital, he "wasn't going to see the judge until another two days" so he "might as well go through the pain and see the judge" so that he could "get out of there quick." Matthews was not brought before a judge. He was held at



Central Booking for about three hours before officers removed him from the holding cell, told him that the case had been dismissed, and told him that he was allowed to leave.

Matthews went directly home. He was then transported to [REDACTED] Hospital in an ambulance. In the ambulance, Matthews informed medical personnel that he had been hit by a police officer. At the hospital, Matthews waited in the emergency room ("ER") until he was able to see a doctor, who noticed that his right shoulder blade was out of place. His shoulder was swollen, so the doctor instructed him to take a couple of painkillers. Matthews estimated that he was in the hospital for approximately five hours undergoing x-rays. Matthews' leg and back were x-rayed. [Certified medical records from the hospital were admitted into evidence as Department's Exhibit (DX) 2]. Matthews was given a prescription for painkillers and advised to get a second opinion because his shoulder continued to hurt. Matthews testified that his lower back and his leg continued to hurt and that bruises that formed where he had been struck took two months to disappear.

Matthews decided to file a lawsuit for being "arrested for no damn reason" and for being assaulted. Matthews also filed a complaint with the Civilian Complaint Review Board ("CCRB"). Since this incident, Matthews only leaves his residence to go to work in order to avoid contact with police officers. Matthews confirmed that he had once pleaded guilty to a charge of Disorderly Conduct for engaging in a fight while he was in high school.

On cross-examination, Matthews confirmed that he had called his friend and neighbor Morris and suggested that they walk the dog together in part out of concern for his safety because at night robberies and shootings frequently occur in the neighborhood.

Matthews recalled hearing the officers say, "Look at this guy walking a Toy Yorkie [REDACTED] [REDACTED]" Matthews testified that he took this comment to mean that he was supposed to be walking a pit bull in that neighborhood.

Matthews confirmed that when he called CCRB he left a lengthy message informing them what had transpired during the incident. Matthews agreed that he had told CCRB that he had asked the officers, "How are we looking suspicious? Because I'm walking a Yorkie dog [REDACTED]?" and that Respondent had then asked him, "You want to be a smartass?" Matthews also agreed that he had questioned the officers by asking, "Why are you bothering us?" and that "out of anger" he had exclaimed, "This is fucking bullshit!" as Respondent was checking his pockets. Respondent never told him to take his hands out of his pockets.

Matthews testified that he already had his hood on when the officers pulled up because it was cold outside. He denied having his hands in his pockets. Morris kept quiet. Morris was not handcuffed or struck. Matthews asserted that he was struck with the baton five to six times. Matthews agreed that he had informed CCRB investigators, during his interview on October 26, 2009, that he had visited a private doctor for x-rays and that he had sustained a shoulder fracture. Matthews stated that because his shoulder was swollen at the time, the doctor was not certain as to the damage done to his shoulder until the swelling subsided. It was only then that he could confirm that no fracture had occurred.

Matthews testified that he did not resist being handcuffed by Respondent. While he was being struck with the baton, Matthews looked at the faces of the other officers and he could see that they were observing Respondent's actions with incredulous expressions.



One of the officers at the scene was a sergeant but he ignored Matthews' pleas to be taken to a hospital even though they were sitting right next to each other in the police van. At the 73 Precinct, Matthews again requested medical attention but his requests were ignored. A nurse was present at Central Booking. This nurse recommended that Matthews be transported to a hospital but nothing happened. Matthews agreed that he opted to forgo being transported to the hospital after he was told that if he was taken there he would not "see the judge until two days" later.

Matthews was released from Central Booking that morning. An ambulance did not arrive at Matthews' residence to transport him to the hospital until 12 hours after he was released from Central Booking and his visit to the hospital. Matthews testified that this time lapse was due to the fact that his mother instructed him to stay home until she arrived home so that she could go to the hospital with him.

Matthews decided to file a civil suit seeking one million dollars in damages after speaking with his brother. Matthews recounted previous instances in which officers from the 73 Precinct have harassed him, his friends and his family. Matthews estimated that about four of his family members have been harassed by officers assigned to the 73 Precinct prior to the incident. Matthews also recalled that there had once been a riot on his block. Afterwards, Matthews' neighbors and some of his family members went to the stationhouse to protest police action during the riot. Matthews had never seen Respondent prior to October 8, 2009.

Matthews testified that he did not scream or yell at Respondent during this incident even when he uttered profanity. Matthews recalled that he held on to the dog's leash, even while he was being struck by Respondent's baton, until Respondent roughly

pulled the leash away and handed it to Morris. Matthews asserted that Morris was quiet during this incident because he has been harassed by officers in the past.

On redirect examination, Matthews testified that Morris had interacted only with the other officers. Matthews stated that his decision to file a lawsuit was the result of a conversation with his brother who is a police officer with the Mount Vernon Police Department.

Police Officer April Andresen

Andresen, a three-year member of the service ("MOS"), has been assigned to the 90 Precinct since January, 2011. Andresen was assigned to the 73 Precinct after she graduated from the Police Academy. Andresen recalled that she was one of the MOS who was present when Respondent arrested Matthews on October 8, 2009. Andresen later received a Schedule "B" Command Discipline ("CD") for failing to make a memo book entry regarding this encounter.

Andresen recalled that on October 8, 2009, she was in the van on patrol with Police Officer Villalona, Respondent and Sergeant Cenatiempo. Andresen was sitting behind the driver. Andresen heard Respondent utter, "I think I saw a hand-to-hand. Let's stop them." The van stopped, the officers got out and they stopped two men. Andresen and Villalona approached Morris. Respondent approached Matthews. Andresen could not recall where Cenatiempo was.

Andresen asked Morris pedigree questions such as his name, address, and date of birth. Andresen was too far away from Respondent and Matthews to hear their interaction. Andresen was focused on keeping Morris away from Matthews in order to



keep the situation under control and tactically safe. The entire encounter seemed to be under control until Andresen heard scuffling and heard Respondent instruct Matthews to “stop resisting.” Andresen glanced over at Matthews and Respondent, but quickly refocused her attention on Morris. Andresen’s back was facing Matthews. She was unaware of whether or not Villalona went over to aid Respondent. Andresen was aware that Matthews was handcuffed, placed in the van and transported to the stationhouse with all the officers. Andresen could not recall if Cenatiempo exited the van during this incident.

Andresen could not recall what Matthews and Morris were doing when the officers approached them but she recalled that there was a dog and remembered that Morris had custody of the dog toward the end of her interaction with him. Respondent had stated that a possible hand-to-hand transaction had transpired but Andresen had no personal knowledge of whether or not anything actually occurred. Andresen did not frisk Morris or Matthews or engage in any physical interaction with either of them. On March 4, 2010, Andresen was interviewed at CCRB regarding this incident and a CCRB investigator asked Andresen whether a crowd had ever gathered at any point while Matthews was being arrested. Andresen agreed that she had answered, “No. There was no crowd.”

During cross-examination, Andresen reinforced that she was a relatively new MOS at the time of this incident and that all of the other officers at the scene were senior to her in service. Consistent with the tactical training she had received at the Police Academy, she partnered with Villalona in approaching Morris while Respondent approached Matthews. She agreed that MOS are trained to stay aware of what their

co-workers are doing in order to ensure that nothing that demands their attention is needed. She agreed that Morris was compliant and he did not curse or make any threatening gestures. While she was engaged with him, Andresen heard Respondent become involved in some type of physical scuffle with Matthews but she did not go to assist Respondent. Andresen recalled that she saw Matthews try to move his arms while he was handcuffed. Andresen never observed Respondent using his baton to strike Matthews. Andresen recalled that Morris instructed Matthews to "just listen to him man, do what he says." During the trip to the precinct, Andresen did not hear Matthews request medical attention or complain about an injury.

On redirect examination, she recalled that Matthews was flailing his arms while Respondent was attempting to handcuff him which made it difficult for Respondent to put the cuffs on Matthews. Andresen was preoccupied with Morris and was only able to turn her head to observe Respondent and Matthews for one to two seconds before redirecting her attention to Morris. Andresen did not feel that her safety was in jeopardy.

#### Respondent's Case

Respondent called Sergeant Carmine Cenatiempo (retired) as a witness and testified on his own behalf.

#### Sergeant Carmine Cenatiempo (retired)

Cenatiempo retired from the Department in October, 2011, after a 21-year career. Cenatiempo was a sergeant for nine years. On October 8, 2009, Cenatiempo was working as an Operation Impact sergeant supervising Respondent, Andresen and



Villalona. This was not the first time Cenatiempo had worked with this group. They were patrolling in a marked van. The van stopped near [REDACTED] because Respondent had observed two men engaging in an interaction which Cenatiempo did not personally observe. Cenatiempo turned his attention to the computer in order to log in and run the individuals' names.

As Respondent, Andresen and Villalona exited the van, Cenatiempo remained behind to run the names of the individuals they had stopped to see if they had any warrants. As he was booting up the computer, the van started rocking and Cenatiempo saw Respondent struggling with one of the individuals in front of the van. That individual was Matthews, who was trying to push off the front of the van and trying to prevent being handcuffed by Respondent by pulling his arms away. Respondent was trying to grab Matthews' arms and handcuff him. Cenatiempo could not hear if Respondent issued Matthews any commands to stop resisting. Cenatiempo exited the van and approached Respondent and Matthews but Matthews was already handcuffed. Cenatiempo did not see Respondent use his baton to strike Matthews. Andresen and Villalona were standing on the sidewalk next to Morris. Matthews was placed in the van. Matthews did not make any complaints or request medical attention. Cenatiempo did not see any injuries on Matthews.

As the supervisor, Cenatiempo made the determination that Matthews should be arrested without asking Respondent what had happened. Cenatiempo considered Respondent an excellent worker who was self-motivated and who made many arrests.

On cross-examination, Cenatiempo stated that he was not aware that Respondent had been the subject of other allegations which had been substantiated by CCRB.

Cenatiempo did not hear Matthews yelling. Cenatiempo confirmed that he had received a CD for failing to make a memo book entry regarding this stop and arrest. Cenatiempo could not recall whether he had signed the CD. Cenatiempo knew that Respondent was arresting Matthews for Disorderly Conduct and Resisting Arrest.

On redirect examination, Cenatiempo confirmed that he was on sick leave for approximately one year before he retired from the Department due to a line-of-duty injury.

#### Respondent

Respondent, a five-year MOS who has always been assigned to the 73 Precinct and who has made approximately 130 arrests, recalled that he had joined the Impact Robbery Task Force Unit about two months before this incident. On October 8, 2009, he, Andresen, Villalona and Cenatiempo were performing "positive proactive policing in regard to a robbery pattern that was developing in the 73 Precinct." Respondent explained that the robbery pattern involved "anywhere from two to five male blacks in the area" who "sometimes used handguns. They were taking anything from cell phones, computers, money, and it was usually robberies done by force." Respondent was in the first row of the bench seats as the van was travelling northbound [REDACTED] onto the intersection [REDACTED].

Respondent looked out of the front windshield and saw two men standing in the northwest corner of the intersection. One, whose name he soon learned was Matthews, was wearing a red hooded sweatshirt with the hood down while the other was wearing a black jacket. Respondent saw Matthews extend his arm in the direction of the individual



wearing the black jacket who then reciprocated Matthews' action. Respondent testified that he saw what he "believed to be a hand to-hand drug transaction" and that he saw "an object" in Matthews' hand although he could not tell what that object was. Respondent recalled that as the object was being passed, Matthews "became aware of my presence or became aware of the van's presence" and looked over his shoulder at the van. Matthews then began walking away from the other individual, put on his sweatshirt hood, and walked away from the corner. Respondent alerted the other MOS inside the van of what he had seen and stated that he wanted to stop the two men. Respondent did not elaborate on why he wanted to stop the two men but felt that his "years in the Department and lingo used by, you know, familiar officers, stating I think I saw a hand-to-hand is enough description."

Villalona, who was driving the van, stopped the van allowing Respondent to exit. Respondent stated that his intention was to stop Matthews and question him about "what he was doing in a robbery-prone area, in a drug-prone location at 1:30 in the morning, with one individual." Respondent testified that he was curious as to why Matthews would place his hood on his head and walk away once he became aware of a police presence and he "wanted to find out why."

Respondent approached Matthews alone while Andresen and Villalona tactically positioned themselves between Matthews and Morris. Cenatiempo remained in the van. Respondent asked Matthews to "please remove your hands from your sweatshirt pockets" in order to ensure his own safety and the safety of Matthews. Matthews became aggravated and said, "Fuck you. Why do I have to do anything? I'm not doing anything. Fuck you." Respondent was about five feet from Matthews and wanted to see Matthews'

hands “for safety purposes” because he “couldn’t see what’s in his hands” or pockets. Respondent “didn’t know if there was a weapon” pointed at him or if Matthews was “preparing a weapon to be pulled” on him. Respondent reasoned that his safety was in jeopardy because he could not see Matthews’ hands. Respondent requested two or three times that Matthews remove his hands from his pockets but Matthews “increasingly became more defiant.” Respondent reacted by stepping toward Matthews and using both of his hands to forcibly remove Matthews’ hands from his pockets by grabbing hold of the area near his wrist and forearm. Matthews then pushed Respondent in the chest and said, “What the fuck are you doing? Don’t touch me.”

Respondent testified that he could have arrested Matthews for Disorderly Conduct for assaulting a MOS. Respondent reported that his “level of suspicion is now raised to the point where I don’t know why this gentlemen is acting this way.” Respondent testified that “coupled with the pushing and as I approached him and as I took his hands out of his pockets, now he’s calling me by my name.” Respondent asserted that Matthews told him, “You know Officer McGurk now I got you,” which led Respondent to believe that Matthews had been searching for a way to get him in trouble. Respondent reported that Matthews’ language and actions confused him because he could not understand where his animosity was coming from. Respondent stated that his intention at that time was to “find out and inquire what was going on to basically create this level of aggression towards the police.”

Respondent made the decision to place Matthews under arrest after Matthews pushed him. He warned Matthews by stating “you’re going to be placed under arrest.” Respondent then reached for his handcuffs while trying to control Matthews who was

“flailing his arms around” and being uncooperative. Matthews was “shaking his arms away from his body. He was raising his arms up above his head. He was keeping his arms pinned close to his body.” Respondent and Matthews were “shuffling in the middle of the street” so Respondent attempted to take control by maneuvering Matthews towards the front of the van which was parked nearby. Matthews had his back to Respondent with his chest against the front of the van but was trying to push off the hood of the van. Respondent held one of Matthews’ hands at this point and was trying to bring the arm behind Matthews’ back while attempting to gain control of the other arm but “nothing was working.” Respondent stated that he is approximately five feet ten inches. He estimated that Matthews was about six feet two inches.

Based on his Police Academy training and tactical training, Respondent believed that Matthews was resisting arrest since he had instructed him two to three times to “stop resisting” as he was attempting to handcuff him. Respondent testified that since the next tactical step would be for him, as the arresting officer, to increase his level of force to the next minimal level, he extended his expandable baton and struck Matthews one time across the middle of his back which “led him to drop both of his hands for enough time” to “control him,” handcuff him and place him under arrest. Respondent stated that his use of his baton was justified because he needed “to gain control and to overcome the resisting arrest.”

Respondent placed the handcuffed Matthews into the van. None of the other officers assisted Respondent in handcuffing and arresting Matthews. Respondent denied that he had struck Matthews with the baton again after he had successfully handcuffed Matthews. In the van, Matthews was forced to sit in the extreme rear bench of the van



and was transported to the 73 Precinct. Respondent stated that Matthews never complained of being in pain or requested any medical attention at any point during the transport.

Respondent asserted that based on the circumstances of the situation, which included the late hour and the raised voices which alerted neighbors to look outside of their windows to witness the commotion, he decided to charge Matthews with Disorderly Conduct as well as Resisting Arrest. Respondent's decision was validated by Cenatiempo, his supervisor. At approximately 1:55 a.m., Respondent completed his arrest paperwork, which included an online arrest report and a Complaint Report [Respondent's Exhibit (RX) A].

At the precinct, Matthews was initially lodged in a holding cell but then was brought to the front desk. Respondent did not recall hearing Matthews request medical attention at any point. Respondent discussed the arrest with an Assistant District Attorney ("ADA") at about 8:00 a.m. He was informed shortly afterwards that the ADA had declined to prosecute Matthews. The ADA informed Respondent that he had charged Matthews with the wrong offense and that had Respondent charged Failure to Obey a Police Order instead of Disorderly Conduct, the DA's office would have continued to process Matthews' arrest. Respondent had charged Matthews with Disorderly Conduct because Matthews was acting disorderly.

Respondent never prepared a Stop, Question, and Frisk Report ("UF-250") regarding his interaction with Matthews because he had filled out all the arrest paperwork which contained the same information.

Shortly afterward, Respondent was notified that he had an interview with Corporation Counsel and was also served papers which indicated that someone had initiated a lawsuit against him

On cross-examination, Respondent repeated his testimony that Matthews had pushed him on his chest. Respondent was confronted with a statement he made at his CCRB interview on February 2, 2010. At his CCRB interview, Respondent stated that Matthews had pushed him but that he could not recall what part of his body Matthews' hands had made contact with, his shoulder or his chest. Respondent testified that his memory regarding the details of this incident was clearer at the time of this trial than it was when he was interviewed at CCRB. Respondent also told his CCRB interviewer that Matthews had become "combative" by "yelling and screaming" that Respondent was "violating his rights" when Respondent was attempting to frisk him.

Respondent also told his CCRB interviewer that his reason for frisking Matthews was that "it's been my experience that when somebody becomes increasingly more combative it's because they're hiding something. It's generally because they do have something on them and they know they shouldn't." Respondent further stated that his initial suspicion about a drug transaction changed and that Matthew's attitude started to lead him "in the direction that this guy was carrying a weapon." As a result, Respondent decided to frisk Matthews around his waistband by grabbing Matthew's pockets and feeling around his waist to make sure there was no light shell holster or any other kind of weapon holder concealed under his hoodie.

Regarding the timing of the frisk itself however, Respondent maintained that although he had touched Matthews initially to remove Matthews' hands from his pockets,

the frisk for weapons did not occur until after Matthews was handcuffed. Respondent defined a stereotypical frisk as one performed by a MOS in which the subject remains still while being searched. Since Matthews did not remain still initially, Respondent reasoned that he could not have frisked him in the traditional sense. Respondent justified his actions by stating that although the stop was initially conducted regarding a possible drug transaction, it elevated into a frisk for safety purposes after Matthews refused to remove his hands from his pockets despite Respondent's repeated requests that he do so.

Respondent agreed that he did not actually see any drugs or currency being exchanged between the two men. Respondent saw that Matthews was holding an item in his hand, but it turned out to be the leash for the dog which Respondent did not initially notice since Respondent's view was partially blocked from a combination of only seeing Matthews' and Morris' backs and parked cars between the van and the street.

Respondent stated he could not see the dog because "it was a toy Yorkie; that dog is extremely small, smaller than a sneaker at times down on the ground" and that he was focused on what the two men were doing and was not looking at the ground.

Respondent saw the two men "clasp each other's hands" which looked to him like the "classic drug hand-to-hand transaction" and this gave Respondent reasonable suspicion to stop him. Respondent testified that he did not see a leash in Matthews' hands at the time he approached him because Matthews had handed over the dog to Morris before he began walking away from the scene. Respondent admitted that he did not engage in a conversation with Matthews. His first words to Matthews were "for my safety and yours, please remove your hands from your pockets."



Respondent confirmed that Matthews was arrested for violating Penal Law Section 240.20, Subsection 3, engaging in Disorderly Conduct by using obscene language and gestures. Respondent did not observe any civilians near or around Matthews and Morris during this incident. The ADA notified Respondent that they were not going to prosecute Matthews because no members of the public were inconvenienced with respect to Matthews' conduct so charges against Matthews could not proceed. Respondent justified his use of his baton against Matthews based on his claim that because the two men were engaged in a struggle, he had to use "appropriate force to overcome that struggle." The other officers at the scene did not come to Respondent's aid in his struggle with Matthews.

Respondent agreed that under Patrol Guide Procedure 212-21, MOS are required to prepare a UF-250 for stops and frisks of individuals. Respondent did not prepare a UF-250 for his stop and frisk of Matthews because he had thought that there was sufficient information regarding the incident in arrest paperwork he prepared.

### FINDINGS AND ANALYSIS

#### Specification No. 1

It is charged that Respondent, while on-duty on October 8, 2009 at 1:30 a.m., abused his authority by stopping Ernesto Matthews [REDACTED] [REDACTED] without possessing sufficient legal authority to conduct this stop.

It is not disputed that the area surrounding [REDACTED] is a high crime neighborhood where drug sales have taken place and that Matthews and Morris were walking together on the street at 1:30 a.m. Respondent testified that peering

through the windshield of the van he observed what appeared to be a possible “hand-to-hand” exchange between Matthews and Morris. Officer Andresen, who was called as a witness by the Department, corroborated Respondent’s claim that he announced to the other officers inside the van that he had just seen what appeared to be a “hand-to hand” transaction and that is why Officer Villalona pulled the van over. Respondent exited the van, approached Matthews and addressed him.

The Department contended that Matthews’ testimony that he did not hand anything to Morris sufficiently proves that Respondent invented his claim that he had observed what appeared to be a “hand-to-hand” exchange. However, Respondent’s testimony that he saw an object in Matthews’ hand, although he could not tell what that object was, was corroborated by Matthews who acknowledged that he was holding a dog leash in his hand. Respondent’s perception of Matthews’ hand motions while holding this leash might have appeared from some distance away, viewed through the window of a moving van, to be a “hand-to-hand” exchange with Morris.

Even though Respondent’s claim that he had observed what appeared to him to be a “hand-to-hand” exchange of drugs proved to be inaccurate, as no drugs were recovered from either Matthews or Morris, Respondent cannot be found guilty of having abused his authority by stopping Matthews if Respondent’s stop was the result of a faulty perception that he had spotted possible criminal activity. Since the Department did not sufficiently establish that Respondent completely invented his claim that he believed that he had observed what appeared to him to be a “hand-to-hand” exchange, the Department did not meet its burden of proof by establishing that Respondent abused his authority by stopping Matthews without possessing sufficient legal authority to do so.

Respondent is found Not Guilty of Specification No. 1.

Specification No. 2

It is charged that after Respondent stopped Matthews he frisked him without sufficient legal authority to do so.

I find Respondent guilty as charged because I credit Matthews' testimony that Respondent walked up to him and without conducting any questioning immediately proceeded to pat down his clothing. Matthews' testimony has the ring the truth because Matthews candidly admitted that he had accused Respondent of making a "racist joke," regarding the fact that he was walking a "Yorkie" dog, and because Matthews candidly admitted that because he became "angry" about being stopped and frisked he told Respondent, "This is fucking bullshit!" The believability of Matthews' version of this event is further enhanced by his testimony that Respondent did not throw him face down onto the sidewalk. If Matthews was embellishing his testimony regarding this event, it is likely that he would have adamantly denied that he had uttered any curses, in order to present himself in the best light possible, and that he would have asserted that Respondent had thrown him to the ground, in order to paint Respondent's actions in the worst light possible.

As discussed previously under Specification No. 1, Respondent stopped Matthews based on his suspicion that Matthews may have just engaged in a hand-to-hand drug transaction. As stated in Patrol Guide Procedure 212-11(2), an officer may only legally frisk a suspect "if you reasonably suspect you or others are in physical danger."



Respondent asserted in his testimony at this trial that he had frisked Matthews because he had his hands in his pockets and because he refused to comply with Respondent's demands that he remove his hands from his pockets. However, Respondent told his CCRB interviewer that he had frisked Matthews because Matthews had become verbally combative and "it's been my experience that when somebody becomes increasingly more combative it's because they're hiding something. It's generally because they do have something on them and they know they shouldn't" and that Matthews' verbal combativeness led him "in the direction that this guy was carrying a weapon" so he frisked Matthews around his waistband by grabbing Matthews' pockets and feeling around his waist to make sure he was not concealing a weapon or "a light shell holster or any other kind of weapon holder." Moreover, Respondent did not claim that he saw a bulge on Matthews or that he had any other reason to suspect that Matthews was carrying any concealed weapon and, thus, no reason to be concerned about his own physical safety or the safety of the officers with him. Respondent merely asserted that he had a gut feeling that Matthews was carrying a weapon. Since Respondent enunciated no more than a mere hunch that Matthews might be carrying a weapon, Respondent's explanation as to why he frisked Matthews does not rise to the level of reasonable suspicion. Based on the above analysis, Respondent did not have reasonable suspicion to conduct a frisk of Matthews' person.

Respondent is found Guilty of Specification No. 2.

Specification No. 3

It is charged that Respondent wrongfully used force against Matthews by striking Matthews with his baton without proper police necessity.

Matthews testified that Respondent first struck him with a baton only after Respondent had already handcuffed him. Respondent asserted that he only used his baton to strike Matthews because he resisted when Respondent tried to handcuff him. Respondent claimed that his use of his baton was tactically justified because he could not otherwise have gained physical control of Matthews.

Respondent's claim that he was forced to use his baton to get physical control of Matthews must be examined in light of the fact that Respondent never requested assistance from Andresen or Villalona or Cenatiempo to get physical control of Matthews. It is not disputed that Morris was cooperative; that he did not move from the spot where he had been stopped; that he did not try to come to Matthews' aid; that he did not pose a danger to the officers; and that he was not being arrested. Since Andresen and Villalona were standing next to Morris only steps away from Respondent and Matthews, if Respondent had truly needed assistance in gaining physical control of Matthews, he could have requested that one of these two officers, or Cenatiempo who was seated inside the nearby van, assist him. The fact that he did not even request any assistance belies his claim that Matthews was resisting. Thus, I find that Respondent's action of striking Matthews with his baton was gratuitous.

Respondent is found Guilty of Specification No. 3.

Specification No. 4

It is charged that Respondent abused his authority by arresting Matthews without sufficient legal authority.

Respondent arrested Matthews for committing the offense of Disorderly Conduct.<sup>1</sup> In his online arrest report (RX A), Respondent entered that he had arrested Matthews for “DIS/CON: OBSCENE LANG/GESTURES” pursuant to subsection 3 of the offense of Disorderly Conduct.

One of the elements of the offense of Disorderly Conduct is that the person has intentionally caused, or recklessly created a risk of, public inconvenience, annoyance or alarm. Although Respondent asserted that Matthews was yelling on the street which could have awakened people sleeping in nearby buildings, there is no support for his claim. Andresen, who was standing nearby, corroborated Matthews’ testimony that he did not scream or yell during this incident and Cenatiempo could not recall hearing any yelling. Moreover, Matthews could not have created a risk of public inconvenience, annoyance or alarm to any people on the street because there were none. Respondent testified that he did not observe any civilians near or in the area around Matthews and Morris during this incident and Andresen further corroborated Matthews’ testimony that at the point when Respondent arrested Matthews for Disorderly Conduct there was no crowd of bystanders nearby.

I find that Respondent lacked probable cause to arrest Matthews for Disorderly Conduct because he had no legitimate basis on which to charge Matthews with this offense. The record establishes that at the point in time when Matthews was arrested by Respondent, he could not have intentionally caused, or recklessly created a risk of, public

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<sup>1</sup> Penal Law Section 240.20.

inconvenience, annoyance or alarm, because, since there was no yelling which could have awakened anyone and since members of the public were not on the street at this late hour.

It is clear from his own testimony that Respondent either does not understand, or simply decided to ignore, the import of the “public inconvenience, annoyance or alarm” element of the offense of Disorderly Conduct.

Respondent is found Guilty of Specification No. 4.

#### Specification No. 5

It is charged that Respondent failed to prepare a Stop, Question and Frisk Report Worksheet as required.

Respondent admitted that he did not prepare a Stop, Question and Frisk Report Worksheet regarding his stop and frisk of Matthews. Respondent testified that at that point in time he was not aware that even when a stop resulted in an arrest he still was required to prepare a Stop, Question and Frisk Report Worksheet in addition to his arrest paperwork.

Respondent is found Guilty of Specification No. 5.

#### PENALTY

In order to determine an appropriate penalty, Respondent’s service record was examined. See *Matter of Pell v. Board of Education*, 34 NY 2d 222 (1974).



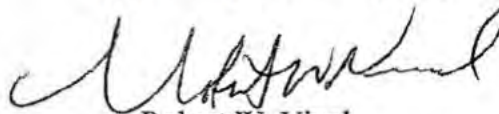
Respondent was appointed to the Department on July 10, 2006. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

The Advocate recommended that Respondent forfeit 20 vacation days.

The instant misconduct marks the third occasion during a two-year period (from September, 2007 to October, 2009) in which Respondent has engaged in misconduct regarding a stop of a civilian on the street (see attached Confidential Memorandum).

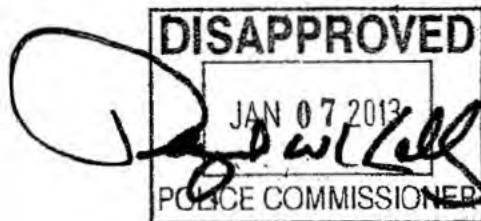
Consistent with progressive discipline, I recommend that Respondent forfeit 20 vacation days.

Respectfully submitted,



Robert W. Vinal

Assistant Deputy Commissioner - Trials



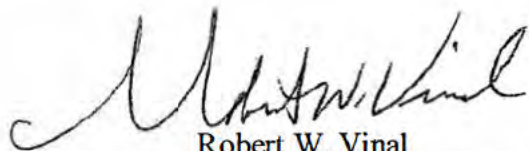
POLICE DEPARTMENT  
CITY OF NEW YORK

From: Assistant Deputy Commissioner - Trials  
To: Police Commissioner  
Subject: CONFIDENTIAL MEMORANDUM  
POLICE OFFICER KEITH MCGURK  
TAX REGISTRY NO. 942165  
DISCIPLINARY CASE NO. 2010-2495

The Respondent received an overall rating of 3.0 on his 2011 performance evaluation, 3.5 on his 2010 evaluation, and 4.0 on his 2009 evaluation. He has been awarded one Meritorious Police Duty medal. [REDACTED]  
[REDACTED] He has no monitoring records.

He has a prior formal disciplinary record. In 2010, he forfeited ten vacation days after he pleaded *nolo contendere* to two separate disciplinary cases. In one case, he was charged with having abused his authority, during September, 2007, by wrongfully stopping a civilian on the street. In the other case, he was charged with having abused his authority, in March, 2008, by wrongfully stopping a civilian on the street, uttering a discourteous remark to the civilian by calling him "an asshole," and frisking and searching the civilian without sufficient legal authority.

For your consideration.



Robert W. Vinal  
Assistant Deputy Commissioner Trials